FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 78-1840**

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
*Appellants,*

v.

UNITED STATES OF AMERICA, BENJAMIN R. CIVILETTI, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
*Appellees.*

**On Appeal From the United States District Court For the District of Columbia**

## APPELLANTS' REPLY BRIEF

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## INDEX


Page

I. The Principal Issues Before the Court ..... 1

II. Recurring Positions of Appellees ..... 2

III. The Construction of Section 5 of the Act ... 9

IV. The Construction of Section 4 of the Act ... 13

V. The Constitutional Limits Upon the Power of Congress with Respect to Section 5 of the Act 16

VI. The Impact of Section 5 of the Act Upon Basic Concepts of Federalism ..... 18

VII. Preclearance by the Attorney General ..... 19

VIII. Summary ..... 23

IX. Conclusion ..... 24


## TABLE OF AUTHORITIES

Cases:


*Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) 5

*Beer* v. *United States*, 435 U.S. 130 (1976) ..... 2, 5

*Berry* v. *Doles*, 438 U.S. 190 (1978) ..... 5

*Blue Chips Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975) ..... 14

*Briscoe* v. *Bell*, 432 U.S. 404 (1977) ..... 22

*Chung Fook* v. *White*, 264 U.S. 443 (1924) ..... 14

*City of Richmond* v. *United States*, 422 U.S. 358 (1975) .....10, 11, 12

*Corona Coal Co.* v. *United States*, 263 U.S. 537 (1924) 14

Page

*Crooks* v. *Harrelson*, 282 U.S. 55 (1930) ..... 14
*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) .... 14
*Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) ..... 18
*Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945) ..... 15
*George Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245 (1929) ..... 14
*Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978) ..... 14
*Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) ..... 3
*Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959) ..... 17
*Milliken* v. *Bradley*, 433 U.S. 267 (1977) ..... 7
*Morris* v. *Gressette*, 432 U.S. 491 (1977) ..... 22
*National Home for Disabled Volunteer Soldiers* v. *Wood*, 299 U.S. 211 (1936) ..... 14
*National League of Cities* v. *Usery*, 426 U.S. 833 (1976) 18
*Oregon* v. *Mitchell*, 400 U.S. 112 (1970) .....3, 17
*Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98 (1937) ..... 14
*Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947) 14
*Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184 (1912) ..... 14
*Perkins* v. *Matthews*, 400 U.S. 379 (1971) ..... 5
*Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) ..... 14
*Richards* v. *United States*, 369 U.S. 1 (1962) ..... 14
*Rizzo* v. *Goode*, 423 U.S. 362 (1976) ..... 19
*Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977) 14
*Smith* v. *Allwright*, 321 U.S. 649 (1944) ..... 8
*South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) ..10, 15, 16, 17



Page

*St. Louis, I.M. & S.R. Co.* v. *Taylor*, 210 U.S. 281 (1908) ..... 14
*Taft* v. *Commissioner*, 304 U.S. 351 (1938) ..... 14
*Terry* v. *Adams*, 345 U.S. 461 (1953) ..... 8
*United States* v. *Board of Commissioners*, 435 U.S. 110 (1978) (cited as "*Sheffield*") .....13, 14
*United States* v. *Great N. Ry. Co.*, 343 U.S. 562 (1952) 15
*United States* v. *Lexington*, 232 U.S. 399 (1914) ..... 15
*United States* v. *Missouri Pac. R.R.*, 278 U.S. 269 (1929) 15
*United States* v. *Oregon*, 366 U.S. 643 (1961) ..... 15
*United States* v. *Public Utility Commission*, 345 U.S. 295 (1953) ..... 15
*United States* v. *Sisson*, 399 U.S. 267 (1970) ..... 14
*Washington* v. *Davis*, 426 U.S. 229 (1976) ..... 3
*Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) ..... 5
*White* v. *Regester*, 412 U.S. 755 (1973) ..... 5
*Wilbur* v. *U.S.*, 284 U.S. 231 (1931) ..... 14
*Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) .....11, 12

CONSTITUTION:

U.S. CONST. art. IV, § 4 ..... 19
U.S. CONST. amend. I ..... 18
U.S. CONST. amend. V ..... 18
U.S. CONST. amend. IX ..... 18
U.S. CONST. amend. X .....18, 19
U.S. CONST. amend. XIV .....17, 18
U.S. CONST. amend. XV .....*passim*

Page

STATUTES:

42 U.S.C.A. § 1973b (Cum. Supp. 1974 to 1978) ..13, 14, 15, 19

42 U.S.C.A. § 1973c (Cum. Supp. 1974 to 1978) ....*passim*

Georgia Election Code, GA. CODE ANN. §§ 34-101 to 9902 (1970 & Cum. Supp. 1979) .....6, 12

Georgia Municipal Election Code, GA. CODE ANN. §§ 34A-101 to 1602 (1970 & Cum. Supp. 1979) ..4, 6, 12, 19, 20

REGULATIONS:

28 C.F.R. § 51.3(d) (1978) .....20, 21

28 C.F.R. § 51.8 (1978) .....15, 19, 20

28 C.F.R. § 51.10(a) (1978) ..... 20

28 C.F.R. § 51.18(a) (1978) ..... 20

28 C.F.R. § 51.24 (1978) .....20, 21

MISCELLANEOUS:

L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW (1978) ..... 23

*Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellants City of Rome* ..... 12

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**On Appeal From the United States District Court For the District of Columbia**

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## APPELLANTS' REPLY BRIEF

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In this Reply Brief Appellants restate the issues before this Court, reply to several recurring positions of the brief submitted by Appellees (the "Appellees' Brief"), and reply, *seriatim*, to each portion of Appellees' Brief.

### I.

### THE PRINCIPAL ISSUES BEFORE THE COURT

The principal issues before the Court relate to the impact of Section 5 of the Voting Rights Act of 1965,

as amended (the "Act"), upon a political subdivision that has proved the absence of any discriminatory purpose in the adoption of certain electoral provisions and annexations. A case of this nature has never been before the Court.

The Appellees have made the "primary submission," Appellees' Brief at 51, that Congress may prohibit electoral changes whether or not such changes are, in themselves, constitutional violations. In this regard, Judge McGowan noted in the opinion of the District Court that Rome's argument is "squarely presented for decision on the facts of this case." Juris. State. at 32b n.69. Thus, this case provides an opportunity for determination of the scope of congressional power under Section 2 of the Fifteenth Amendment.

## II.

## RECURRING POSITIONS OF APPELLEES

1. *Construction of the Court's Prior Decisions.* Appellees have indicated, both directly and by inference, that the issues before this Court are matters of well settled law. Appellees' Brief at 2, 18, 24, 26-27, 49-50, 52-55. In contrast to Appellees' assertion that these matters are "clear and well established," *id.* at 27, and that there exists a "settled and well-reasoned body of case law interpreting Section 2 of the Fifteenth Amendment and the Voting Rights Act," *id.* at 50, Mr. Justice Marshall, dissenting in *Beer* v. *United States,* 425 U.S. 130, 148 n.4 (1976), observed:

> The Court's decisions relating to the relevance of purpose and/or effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web. The possible theoretical approaches are three: (1) purpose alone is the test of unconstitutionality, and effect is irrelevant, or relevant only insofar as it sheds light on purpose; (2) effect alone is the test, and purpose is irrelevant; and (3) purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. At various times in recent years the Court has seemed to adopt each of these approaches.



The court below indicated that "[w]hether the Fifteenth Amendment reaches only purposeful discrimination is an important and unsettled constitutional question." Juris. State. at 33b. Demonstrative of the unsettled nature of these issues are the constructions by Appellants and Appellees of this Court's decisions in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) and *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). *Compare* Appellants' Brief at 61-66 *with* Appellees' Brief at 54-57. Moreover, Appellees' suggestion that the construction of Section 5 is well settled is incorrect because this Court has not previously considered the application of Section 5 to a political subdivision found innocent of purposeful discrimination. Hence, the cases in Appellees' Brief at 26-27, all decided before this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), are distinguishable.

2. *Scope of Appellants' Constitutional Attack.* Appellees appear to suggest that Appellants challenge the constitutionality of the entire Act. Appellees' Brief at 22, 49-50, 66. To the contrary, Appellants question the construction and constitutionality of Section 5 of the Act in the context of a political subdivision found innocent of any purposeful discrimination with respect to its political affairs. App. at 171; Appellants' Brief at 4-5; Juris. State. at 5.

3. *The "Freezing" of Rome's Elections.* Appellees urge that the District Court correctly found that the freezing of elections in the City of Rome is "self-imposed." Appellees' Brief at 67, 68 n.38. Appellees' argument is based upon (1) disregard for this Court's interpretation of Section 5 at the time of enactment of the changes here at issue, Appellants' Brief at 16; (2) failure to acknowledge that the electoral changes here at issue were precleared by virtue of the preclearance of the Georgia Municipal Election Code in 1968, *id.* at 90-93; and (3) disregard of the fact that Rome's changes were validly enacted laws of the State of Georgia. App. at 82-85; Appellants' Brief at 84 n.75.

Specifically, Appellees urge that the portion of the political change which established the number of representatives from each of the three "new" wards could have been utilized together with the "old" plurality vote requirement; however, provisions for number of representatives to be elected from each ward are contained in the very laws that have not been precleared by the Attorney General. Juris. State. at 6e-7e, 10e-11e. The questionable validity of elections held in such a chaotic circumstance is apparent. Appellees also assert, without citation, that the "new" three-ward system provided for three commissioners from each ward. This is erroneous: the law reducing the number of wards did *not* establish the number of commissioners. App. at 62, 67-68, 209-210 n.6.

Appellees correctly acknowledge that city officials were obligated to conduct elections according to Georgia law. They fail to recognize, however, that Rome's compliance with precleared provisions of the Georgia Municipal Election Code fulfilled such obligation.



In any event, the District Court found that in the circumstances elections are "technically infeasible." Juris. State. at 42b-43b. See also *Berry* v. *Doles,* 438 U.S. 190, 197 n.1 (1978) (Powell, J., concurring); *Beer* v. *United States,* 425 U.S. 130, 138 (1976); *Perkins* v. *Matthews,* 400 U.S. 379, 395-96 (1971); *Allen* v. *State Board of Elections,* 399 U.S. 544, 572 (1969).

4. *Proportional Representation.* Appellees assume throughout their argument that Section 5 of the Act requires the Attorney General to structure the political system of a municipality in order to insure proportional racial representation. This attitude is demonstrated by Appellees' analysis of the unsuccessful campaign of Reverend Hill for the Rome Board of Education in 1970, Appellees' Brief at 7-8. Appellees assume that the inexorable political choice of the black citizens of Rome would be the election of a black representative. *See* Appellees' Brief at 11, 32-33, 35.

Appellees' position is contrary to law which does appear to be well settled: "[I]t is not enough [to sustain constitutional claims] that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." *White* v. *Regester,* 412 U.S. 755, 765-66 (1973). This constitutional standard is equally applicable to the operation of Section 5. Mr. Justice Stewart, writing for the Court in *Beer* v. *United States,* 425 U.S. 130, 136 n.8 (1976), observed: "This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population. See *Whitcomb* v. *Chavis,* 403 U.S. 125 . . . ."

The position of the Appellees, and the effect of the District Court's judgment, is that a state or municipality seeking to effect salutory political changes—for example, annexations to provide needed services or to solve a financial exigency—is prohibited from doing so unless identifiable racial groups are assured proportional representation by group members. Such a position is contrary to the Fifteenth Amendment, the language of Section 5, and prior decisions.

Appellees also make certain value judgments with respect to the system of governance chosen by the people of Rome. For example, Appellees assert that the Assistant Attorney General indicated to Rome that if it undertook to use a plurality win method of election or "fairly" drawn "single-member districts," he would reconsider his position. Appellees' Brief at 12 n.13. Appellees also undertake to suggest, in detail, alternative political structures for the City of Rome. Appellees' Brief at 41-42. The views of the Department of Justice as to the appropriate structure for Rome's government have been advanced only by the Department of Justice. No citizen of Rome has instituted an action questioning the propriety of the changes or sought to intervene in this action. Also, the majority vote requirement, which Appellees find particularly objectionable, Appellees' Brief at 17, is identical to the majority vote feature precleared as part of the 1968 Georgia Municipal Election Code and the 1964 Georgia Election Code.

A political orthodoxy as to the "proper" structure of state and local government is being imposed by the Attorney General. The imposition of such a policy, where there is no constitutional violation, represents



an attempt to "restructure local governmental entities" and "to mandate a particular method or structure of state or local" governmental affairs that was indicated to be an abrogation of the principles of Federalism in *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977). See App. at 178.

5. ***The Absence of Racial Animus.*** Appellees acknowledge the finding of the District Court that the political changes and annexations here at issue were enacted without any racially discriminatory purpose. Appellees' Brief at 17. Nevertheless, Appellees imply that racial animus exists in the political affairs of Rome.

Rome's political changes, utilized by many other municipal governments, and Rome's annexations, made as a result of the natural growth and development of the City, relate to the "right to vote" only by reason of Appellees' belief that racial groups have a right to achieve proportional representation. There is no racial discrimination in Rome in the conduct of voter registration or elections. The uncontradicted evidence indicates that no test or device, including a literacy test, has been utilized in Rome for at least forty years. Juris. State. at 6b and footnotes contained therein. Moreover, the District Court made specific findings with respect to the absence of any racial discrimination in the electoral processes of Rome and the conduct of city government. Appellants' Brief at 6-7. Appellees nevertheless argue that the effect of the present electoral changes and annexations "would be to abridge the right to vote on account of race or color." Appellees' Brief at 24.

Similarly, Appellees' treatment of Rome's annexations implies racial animus. According to Appellees, individual consideration of each annexation would permit "substantial diminutions of black voting strength." Appellees' Brief at 37. The necessary implication of this argument is that Rome, and similar subdivisions, might undertake to discriminate officially through piecemeal annexations. Such a supposition is unsupported by the record or reason.

Appellees' attitude is also demonstrated by their remarkable use of the "white primary" cases, *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953). "The changes at issue here enhance the power of purposeful private discrimination to exclude blacks from effective participation in the electoral process." Appellees' Brief at 60. There is no evidence in the record to suggest the existence of any private discrimination in Rome to exclude blacks from effective participation in electoral processes, and, indeed, the findings of the court below are expressly contrary to such a supposition. Appellants' Brief at 6-7. In order for these cases to have any applicability to the changes here at issue, there must be an assumption that such private discrimination exists in connection with a private organization, system, or practice that is an agent of the City. There has been no finding of any such agency relationship. The employment of such authorities by the Appellees represents a categorical assumption that the white citizens of Rome are guilty of purposeful racial discrimination because they reside in one of the States covered by the Act, notwithstanding clear evidence to the contrary.



## III.

## THE CONSTRUCTION OF SECTION 5 OF THE ACT

Appellees have eschewed the analysis of the District Court that Congress established in Section 5 an "irrebuttable presumption" of "purpose" from "effect." Appellees' Brief at 57-58 n.33. In this regard, Appellants again submit that the language of Section 5, together with the legislative history of the inclusion of the "purpose" standard and the appropriate constitutional tests, requires a construction of Section 5 that gives independent significance to the "purpose" standard. "Purpose" should first be analyzed and only if the "purpose" of the changes at issue is unclear or unlawful should the "effect" of the changes be reviewed.

Appellants' proposed construction is said to be "unsound" because it ignores the negative nature of the Section 5 language. Appellees' Brief at 25 n.18. The negative nature of Section 5 merely establishes that the burden of proving the constitutionality of the changes is placed upon the submitting jurisdiction.

Appellees contend that the use of the conjunction "and" in Section 5 requires that preclearance plaintiffs prove not only an absence of discriminatory intent, but also an absence of discriminatory effect, before changes or annexations may be implemented. It is suggested that the alternative conjunction "or" would have been used if the construction proposed by Appellants had been intended. The use of "and," however, sets forth the appropriate constitutional standard. By including a requirement of purpose after the initial drafting of Section 5, Appellants' Brief at 26-27, it appears that an effort was made to parallel the language of Section 5 to the constitutional test.

The original version of Section 5 (Section 8 of S. 1564 and H.R. 6400) required a showing only of the absence of "effect." It is unlikely that, in the process of amending the more stringent original proposals, the members of Congress sought to restrict the preclearance standard by adding a requirement of "purpose." It is more likely that "purpose" was included because changes were to be precleared if they met the recognized constitutional standard. *See South Carolina* v. *Katzenbach,* 383 U.S. at 334.

Appellees suggest that because the opinion in *City of Richmond* v. *United States,* 422 U.S. 358 (1975), looked first to the effect of the proposed annexations and then to their purpose, the Court "expressly recognized that Section 5 imposes a dual requirement for preclearance of voting changes . . . ." Appellees' Brief at 26. The Court found that the black population of Richmond was reduced from fifty-two percent to forty-two percent, *id.* at 371-72, but did not find that this impact was an "effect prohibited by § 5," *id.* at 372. In holding that an "effect prohibited by Section 5" did not exist in Richmond and remanding for further examination of the "purpose" issue, this Court certainly did not hold that Congress proscribed, in Section 5, political changes and annexations having an impact but not enacted with discriminatory purpose. Indeed, Appellants' proposed construction of Section 5 is consistent with this holding, because Appellants argue that "purpose," not "effect," is the essential element of the standard. The Court's remand also seems to suggest that "purpose" is essential.

*City of Richmond* demonstrates that Rome's electoral changes and annexations do not have the type of "effect" proscribed by Section 5. A proscribed effect



was not found in *Richmond* even in the face of findings that the black citizens of Richmond would "command fewer seats on the city council . . . [and that] the annexation will have effected a decline in the Negroes' relative influence in the city." 422 U.S. at 371. *A fortiori,* no proscribed "effect" exists in Rome because the District Court found that black citizens "often hold the balance of power in Rome elections" and that the black community "if it chooses to vote as a group, can probably determine the outcome of many if not most contests." Juris. State. at 55b. 8b.

Appellants have established, under the criteria approved by this Court in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976), that there has been no dilution of the vote of the black citizens in Rome by reason of the electoral changes and annexations. Thus, under *City of Richmond,* there has been no "effect prohibited by § 5." Appellees assert, Appellees' Brief at 33-34, that Rome omitted discussion of the "enhancing factors" of *Zimmer,* and, thus, Appellees assume the existence of *Zimmer's* primary factors, directly contrary to the findings of the court below. In any event, there is no "anti-single shot" voting provision; there has been no showing that "large districts" exist in Rome, and Rome's ward configuration was precleared by the Attorney General. Moreover, if the residency requirement objected to by the Attorney General had been precleared, there would not be a "lack of provision for at-large candidates running from particular geographic subdistricts" with respect both to the Board of Education and the City Commission. The suggestion by the Appellees that a majority vote requirement is a primary *Zimmer* factor is con-

trary to the holding in *Zimmer*. Moreover, such a majority vote requirement has been precleared by the Attorney General with respect to the 1968 Georgia Municipal Election Code and the 1964 Georgia Election Code.

Appellees have suggested a third interpretation of the effect of Rome's annexations upon the voting power of black citizens. Appellees' Brief at 38 n.26. *Compare* Juris. State. at 6b *with* Juris. State. at 52b-53b. The result of Appellees' calculations is an alleged reduction of the relative percentage of black voters by one percent and an increase in the relative percentage of white voters by one percent, "resulting in a total difference of two percent." The findings of the court below, however, indicate that there was an increase in the relative percentage of black voters, Juris. State. at 6b; Appellants' Brief at 14. Under any of the calculations of alleged "effect" made in this case, there has not even been a demonstration of the type of impact found in *City of Richmond not* to constitute a proscribed "effect". *See Brief Amicus Curiae Pacific Legal Foundation In Support of Appellant City of Rome* at 4-5.

All of Appellees' arguments regarding the existence of a prohibited effect presume the existence of racial bloc voting in Rome even though Appellees admit that no statistical demonstration of bloc voting can be made. Appellees' Brief at 8. In the absence of such proof, Appellees rely on a "prediction" based upon Floyd County voting data from a single statewide Democratic primary in 1968 between the former governor and three-term United States Senator Herman Talmadge and Maynard Jackson, who was making his first bid for public office. In view of the long incumbency of Herman Talmadge, the "prediction" of bloc voting is



without probative value, and the findings of the District Court are clearly erroneous. *See* App. at 224-288.

## IV.

## THE CONSTRUCTION OF SECTION 4 OF THE ACT

Appellees have failed to respond to Appellants' structural analysis of Section 4 and have failed, specifically, to respond to the common reference in Sections 5 and 4(a) to Section 4(b). Appellees rely principally upon legislative history indicating that political subdivisions of a covered state are not afforded an opportunity to bailout under Section 4(a). Under the construction advanced by Appellees, *United States* v. *Board of Commissioners* (cited as "*Sheffield*"), 435 U.S. 110 (1978), creates a circumstance in which political subdivisions are required to preclear changes but are not allowed to exempt themselves from the Act. Such an inequity is cured by Appellants' proposed construction.

Appellants first note that the legislative history relied upon by Appellees was authored at a time when a common textual reference between Sections 4(a) and 5 did not exist in the Act. The original bailout proposal, Section 3(c) of S. 1564 and Section 3(c) of H.R. 6400, provided that bailout suits could be instituted only by states "with respect to which determinations have been made under Section (a) [the coverage formula]" or "any political subdivision with respect to which such determinations have been made as a separate unit." The original preclearance provision, Section 8 of S. 1564 and Section 8 of H.R. 6400, required preclearance by a "State or political subdivision for which determinations are in effect under Section 3(a)." Subsequently, the physical structure of the Act was

altered to provide a common reference to Section 4(b) in the bailout provision of Section 4(a) and in Section 5. While there is no legislative evidence to indicate that this change was made in order to allow political subdivisions within covered jurisdictions to bailout, this Court's opinion in *Sheffield,* construing Sections 4(b) and 5, established this proposition.

In light of the plain meaning given to the words of the Act in *Sheffield,* the legislative material referred to by Appellees should be disregarded. *See* Appellants' Brief at 45 n.26 and cases cited therein. See *Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485, 492 (1947); *Taft* v. *Commissioner,* 304 U.S. 351, 359 (1938); *Osaka Shosen Kaisha Line* v. *United States,* 300 U.S. 98, 101 (1937); *National Home for Disabled Volunteer Soldiers* v. *Wood,* 299 U.S. 211, 216 (1936); *Wilbur* v. *United States,* 284 U.S. 231, 237 (1931); *Crooks* v. *Harrelson,* 282 U.S. 55, 59-60 (1930); *George Van Camp & Sons* v. *American Can Co.,* 278 U.S. 245, 253 (1929); *Chung Fook* v. *White,* 264 U.S. 443, 445-46 (1924); *Corona Coal Co.* v. *United States,* 263 U.S. 537, 540 (1924); *Pennsylvania R.R.* v. *International Coal Mining Co.,* 230 U.S. 184, 199 (1912); *St. Louis, I.M. & S.R. Co.* v. *Taylor,* 210 U.S. 281, 295 (1908). *See also Regents of the University of California* v. *Bakke,* 438 U.S. 265, 417-418 (1978) (BURGER, C. J., STEWART, J., REHNQUIST, J., and STEVENS, J., concurring in part and dissenting in part); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.,* 437 U.S. 322, 330-331 (1978); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472-74 (1977); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 201 (1976); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975); *United States* v. *Sisson,* 399 U.S. 267, 297-98 (1970); *Richards* v. *United States,* 369 U.S. 1, 9-10



(1962); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *United States* v. *Public Utility Commission,* 345 U.S. 295, 314-16 (1953); *United States* v. *Great N. Ry. Co.,* 343 U.S. 562, 575 (1952); *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260-66 (1945); *United States* v. *Missouri Pac. R. R.,* 278 U.S. 269, 278 (1929); *United States* v. *Lexington,* 232 U.S. 399, 409-411 (1914).

Appellees also suggest that if the construction of Sections 4(a), 4(b), and 5 proposed by Appellants is accepted, a floodgate of litigation will be opened upon the United States District Court for the District of Columbia. Since Appellees acknowledge the "burden" of bailout litigation, Appellees' Brief at 46, their survey is not persuasive that a flood will be forthcoming. Appellees' survey does demonstrate the pervasive impact of Section 5 and the extent to which it constitutes an intrusion upon the functions of many political subdivisions. The availability of bailout has constitutional significance, *South Carolina* v. *Katzenbach,* 383 U.S. 301, 331 (1966), and thus its availability to political subdivisions innocent of discrimination in voting practices should not be foreclosed because of perceived judicial inconvenience.

Appellees argue, for the first time, that Rome, even if allowed to bailout, could not effect the political changes and annexations here at issue, because such legislation was enacted by the Georgia General Assembly. Appellees' Brief at 48 n.30. This suggestion overlooks Section 51.8 of the Attorney General's regulations, 28 C.F.R. § 51.8, which sets forth the parties responsible for making Section 5 submissions. See Appellants' Brief at 5b-6b. "Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the State or political subdivision

*in which the change is proposed to be effective.*" (emphasis added) Moreover, as the unitalicized portion of the quotation from Section 5 set forth in Appellees' Brief at note 30 indicates, Section 5 is addressed to jurisdictions that "seek to administer" voting changes.

## V.

### THE CONSTITUTIONAL LIMITS UPON THE POWER OF CONGRESS WITH RESPECT TO SECTION 5 OF THE ACT

Appellees seem to concede that only intentional acts violate Section One of the Fifteenth Amendment. Appellees' Brief at 59. Thus, the issue now before the Court is whether Congress may, through Section 5 of the Act, proscribe electoral changes and annexations which have been found to be enacted without a discriminatory purpose but which may have a differential impact upon identifiable racial groups.

Initially, Appellants reiterate that this issue was not decided by *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), which dealt with purposeful racial discrimination. Moreover, Appellants have not sought to resubmit the argument rejected in *South Carolina* v. *Katzenbach* that Section Two of the Amendment only prohibits practices which have been judicially determined to be violative of Section One. Appellants' Brief at 60. Congressional determinations of the existence of constitutional violations are appropriate, so long as they are made within the framework of the Section One requirement of purposeful discrimination.

Similarly, Appellants have not challenged the coverage formula of the Act. See Appellees' Brief at 53-54. Appellants urge, rather, that the standard to be applied by the Attorney General and the United States



District Court for the District of Columbia, in considering the preclearance of changes submitted by a jurisdiction within a covered State, can be no broader than the standards of the Constitution itself, and to the extent that Congress has sought to establish a broader, non-purposeful standard, it has acted without constitutional power.

The failure of this Court in *South Carolina* v. *Katzenbach* to overrule *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959), is not dispositive of Appellants' constitutional claims. *Lassiter* held that literacy tests are not *per se* violations of the Fifteenth Amendment. However, *Lassiter* dealt with a literacy test, fair on its face, as to which no discriminatory application had been charged in the record before the Court. 360 U.S. at 53. The Court, therefore, had no facts to support a finding of a violation of Section One of the Amendment. *South Carolina* v. *Katzenbach,* on the other hand, dealt with a statute based upon exhaustive congressional findings that literacy tests within the covered jurisdictions violated Section One of the Fifteenth Amendment because they were used as instruments of intentional racial discrimination. Although a prior judicial determination is not required, Congress may prohibit only violations of Section One of the Amendment.

The opinions in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), cited by Appellees are consistent with Appellants' position. Each Justice upheld the nationwide ban on literacy tests because the use of such tests denied the vote to black persons educated in dual school systems in violation of the Fourteenth Amendment. It is appropriate to ban literacy tests because of the nexus between the effects of unconstitutional education and the

failure to pass literacy tests. The changes here at issue have no such nexus with previous constitutional violations.

## VI.

## THE IMPACT OF SECTION 5 OF THE ACT UPON BASIC CONCEPTS OF FEDERALISM

In questioning the continuing constitutionality of Section 5 of the Act, Appellants ask this Court neither to "decide the lifespan of the Voting Rights Act," Appellees' Brief at 66, nor to question its "usefulness." *Id.* More fundamentally, Appellants maintain that this Court's conditional constitutional approval of Section 5 was based upon emergency conditions in the covered jurisdictions which no longer exist and did not exist in 1975 when Section 5 was reenacted. In the absence of such compelling justifications, Section 5 must be struck down as violative of basic principles of Federalism and rights protected by the First, Fifth, Ninth, and Tenth Amendments.

Appellees have misconstrued Appellants' reliance upon *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), which establishes affirmative limitations upon the power of Congress when it acts with respect to the States. Appellants recognize that the power of Congress under the Commerce Clause and under the Reconstruction Amendments is quite different. The Fourteenth and Fifteenth Amendments "directly prohibit certain activities by the States," Appellees' Brief at 65; however, *National League of Cities* v. *Usery* recognizes the existence of affirmative protections embodied in principles of Federalism which cannot be overridden when a political subdivision has not engaged in constitutionally prohibited activities. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976), is not inconsistent with this view. Where there has been, as in the present case, no violation of the normative terms of the Fifteenth Amendment, congressional action that eviscerates state enactments, protected by Article IV, Section 4 and the Tenth Amendment, is unconstitutional. Moreover, Appellees' argument that Section 5 is a permissible "prophylactic rule," Appellees' Brief at 21, is particularly offensive to the principles of Federalism and contrary to this Court's holding in *Rizzo* v. *Goode,* 423 U.S. 362, 378 (1976). While the structure of Rome's government may not comport with the views of the Department of Justice, it is nevertheless protected by the principles of Federalism, so long as it does not violate the Fifteenth Amendment.



## VII.

## PRECLEARANCE BY THE ATTORNEY GENERAL

Appellees' argument that the preclearance of the Georgia Municipal Election Code did not constitute preclearance of certain identical procedures previously effected by Rome overlooks the Attorney General's regulations. Section 51.8 specifically provides: "When one or more counties within a State will be affected, the State may submit a change affecting voting on behalf of the covered county or counties." 28 C.F.R. § 51.8; Appellants' Brief at 6b. Although acting without the benefit of such regulations in 1968, the Attorney General of the State of Georgia submitted the Municipal Election Code in this fashion. App. at 97. Appellees now argue that this submission was ineffective, as to the City of Rome, presumably because its Charter was not included with the Georgia submission. Appellants disagree with Appellees' "floodgates" approach to Section 4(a), but it should be noted that

the construction of 28 C.F.R. § 51.8 advanced by Appellees will require state attorneys general to submit individual legislative material for each political subunit within their states. In the case of Georgia alone, the submission of material for each of 530 incorporated municipalities and, at least, 347 subsidiary governmental bodies, would be required. Appellees' Brief at 1a.

Appellees also maintain that without a review of Rome's Charter or some other form of individual submission, the Attorney General was unable to assess the effect of the 1968 Municipal Election Code upon Rome's electoral system. The logical extension of this position is that no assessment of "effect" could have been made with respect to the 1968 Municipal Election Code. This Code applied only to municipal elections conducted within the State of Georgia, and Georgia's submission contained no City Charters or other materials with respect to specific municipalities. However, the Attorney General did question the impact of the 1968 Municipal Election Code upon certain municipalities, other than Rome. App. at 54. *See* Appellants' Brief at 92-93. The Attorney General's failure to take similar actions with respect to Rome has never been explained by Appellees.

Appellees assert that the Attorney General "reasonably" analogized Rome's voluntary supplement of its request for reconsideration to an incomplete initial submission. Appellants disagree with the propriety of such an analogy, but, in any event, the entire structure of the Attorney General's regulations is inconsistent with such a construction. See 28 C.F.R. §§ 51.3(d), 51.10(a), 51.18(a), and 51.24 (1978). The regulations specifically set forth the circumstances during which the time for response to a request for reconsideration will be tolled



during the reconsideration process. Having established the time limits for responses to reconsideration, including extensions of such time limits, the Attorney General should not now be heard to claim that unwritten interpretations of that time period exist. Such a construction is inherently unreasonable; it violates the principle of *expressio unis est exclusio alterius* and sound principles of administrative law.

Appellees also argue that if the Attorney General failed to respond properly to Appellants' request for reconsideration, such a failure had no effect. Appellees are reluctant to analogize the failure to respond to a reconsideration petition to a failure to respond in a timely manner to an initial submission, although they readily analogize a supplementary submission to an incomplete initial submission. The regulations do not state that an objection will be deemed withdrawn if the Attorney General fails to act on a request for reconsideration within sixty days. However, 28 C.F.R. § 51.3 (d) indicates that the Attorney General "shall decide" within sixty days of receipt of a request for reconsideration. Similarly, 28 C.F.R. § 51.24 provides that the Attorney General "shall notify" a submitting authority within sixty days of a request for reconsideration. Both sections impose mandatory requirements upon the Attorney General. If he wishes to continue his objection, he must "decide" and "notify" the submitting jurisdiction. Appellees argue that the Attorney General may continue an objection either by "deciding" and "notifying" or by doing nothing. As the court below noted, the language of Section 51.3(d) is "mandatory rather than permissive and . . . it tracks the time requirement for responses to initial submissions, which is statutorily binding on the Attorney General." Juris.

State. at 27b n.62. The court below suggests that the time limit is "binding," rather than "merely advisory." Juris. State. at 27b-28b n.63.

Finally, Appellees indicate that a failure by the Attorney General to respond to a request for reconsideration within the required time "might" entitle the petitioning authority to seek a court order requiring prompt consideration. *Morris* v. *Gressette,* 432 U.S. 491 (1977), is cited as authority, to some extent, to support this suggestion. However, the court below noted that "under the teachings of *Briscoe* v. *Bell,* 432 U.S. 404 (1977), and *Morris* v. *Gressette,* 432 U.S. 491 (1977), we are unwilling to second-guess the Attorney General on an issue implicating his unreviewable judgment of the merits of a Section 5 application." Juris. State. at 28b n.64. Thus, this novel additional step in the preclearance process is unavailable.



## VIII.

## SUMMARY

The Appellees' position with respect to the proper construction of Section 5 of the Act and the power of Congress under Section Two of the Fifteenth Amendment has failed to recognize the singular nature of the present case. This is the first case to come before this Court in which a political subdivision seeks to administer political changes and effect annexations which have been found to meet the "purpose" standard of Section 5 of the Act and the Constitution.

The Attorney General has imposed upon Rome, and approximately 7,000 other political subdivisions, certain categorical conceptions arising from the unique circumstances that prompted the passage of the Act in 1965. The imposition of these conceptions, together with the policies formulated by his office with respect to the proper structure of local government, threatens, in words borrowed from Professor Tribe, to "short-circuit the pluralist processes of interest accommodation usually structuring legislative decisionmaking." L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW 288 (1978). The imposition of such a political orthodoxy is not constitutionally permissible in the circumstances of this case.

## IX.

## CONCLUSION

The judgments of the District Court dismissing Appellants' case and granting Appellees' Motion for Summary Judgment should be reversed. The City of Rome should be exempted from the Act, or Section 5 of the Act should be declared unconstitutional. Absent either such holding, Appellants pray that the electoral changes and annexations at issue be declared to be effective, either pursuant to the terms of Section 5 or by reason of the actions of the Attorney General in this case.

Respectfully submitted,

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